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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

EILEEN G.,

Petitioner,

v.

THE SUPERIOR COURT OF FRESNO
COUNTY,

Respondent;

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Real Party in Interest.

F078537

(Super. Ct. No. 17CEJ300220-1)

OPINION

THE COURT*

ORIGINAL PROCEEDINGS; petition for extraordinary writ review. Brian M. Arax, Judge.

William Chaddock, for Petitioner.

No appearance for Respondent.

Daniel C. Cederborg, County Counsel, and Kevin A. Stimmel, Deputy County Counsel, for Real Party in Interest.

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* Before Levy, Acting P.J., Peña, J. and Meehan, J.

Eileen G. (mother) seeks an extraordinary writ (Cal. Rules of Court, rule 8.452) from the juvenile court's orders issued at a contested 12-month review hearing (Welf. & Inst. Code, § 366.21, subd. (f)(1))¹ terminating her reunification services and setting a section 366.26 hearing as to her now 12-year-old daughter, Gabrielle G. Mother contends the juvenile court erred in finding it would be detrimental to return Gabrielle to her custody, in excluding rebuttal witnesses and in failing to consider Gabrielle's best interest as a member of a sibling group (§ 366.21, subd. (e)(4)). We affirm.

PROCEDURAL AND FACTUAL SUMMARY

In July 2017, then 10-year-old Gabrielle and her two-year-old brother, Marco, were taken into protective custody after Gabrielle disclosed mother grabbed her by the hair and punched her in the face, causing bruising and swelling. Approximately two weeks before, mother pulled Gabrielle by her pony tail and pushed her inside the school bus, causing her face to hit the handrail inside the bus. The children were placed together in foster care.

Mother denied hitting her children. She told the investigating social worker that Gabrielle, who has significant learning disabilities, was a "wild child" and caused drama every morning because she did not want to go to school. Marco's father, Marco C. (father), said mother was impatient with Gabrielle and he had to defend her. Once mother grabbed Gabrielle and slammed her head on the car because she did not want to tell father goodbye. Mother treated Marco very differently and was affectionate with him. She loved Gabrielle but was not affectionate with her.

The juvenile court sustained allegations mother placed the children at risk of serious physical harm and that she and father endangered them by engaging in domestic violence. (§ 300, subds. (a) & (b)(1).) The court ordered reunification services for mother and father. Mother refused to divulge the identity of Gabrielle's biological father.

¹ Statutory references are to the Welfare and Institutions Code.

By the six-month review of services in March 2018, the parents were doing so well the department believed the children could be returned to their custody if reunification efforts continued. They enjoyed unsupervised visitation with the children in their home, completed their parenting class and actively participated in their Batterer's and Child Abuse Intervention programs. At the six-month review hearing, the juvenile court found the parents were making significant progress and continued reunification services to the 12-month review hearing scheduled for August 2018.

In March 2018, during a meeting with social workers, the parents admitted engaging in a verbal domestic violence dispute during a two-hour unsupervised visit with the children. Mother also admitted to being frustrated with Gabrielle during visitation. She would go to her room when she was frustrated and leave the children in the living room playing.

In April 2018, the department filed a modification petition (§ 388), asking the juvenile court to reinstate supervised visitation with therapeutic oversight based on information from Tara Peterson, the children's therapist. According to Peterson, mother was frustrated and irritated with Gabrielle during unsupervised visits, saying "leave me alone" to the child and calling her a "liar." Gabrielle was tearful and sad during therapy when discussing her mother and did not want to participate in therapy. Peterson believed mother lacked insight into how her behavior affected Gabrielle emotionally. Mother also lacked insight when it came to parenting Marco. Although she was attentive and nurturing toward him, she exhibited poor insight into his developmental and emotional needs. As a result, she caused him frustration and triggered him to tantrum. The department recommended the court order therapeutic supervised visits for mother.

In June 2018, the juvenile court granted the department's section 388 petition, suspended unsupervised visitation and ordered supervised therapeutic visitation between mother and the children. In August, the children were placed with their maternal grandparents. That same month, Marco began visiting father for eight hours on

Saturdays. He was comfortable and happy visiting his father and did not want to return to his grandparents after visits. Gabrielle no longer wanted to visit father, preferring instead to stay with her grandparents.

In a report dated August 16, 2018, the department recommended the juvenile court not return the children to parental custody at the 12-month review hearing. It was concerned the parents, who had separated, would resume living together and engage in verbal domestic violence, resulting in mother taking out her frustrations by physically abusing Gabrielle. The department also recommended the court terminate mother's reunification services because her abusive behavior had not changed, and she minimized the abuse she inflicted on Gabrielle. The department recommended, however, the court continue father's reunification services.

The juvenile court convened a contested 12-month review hearing on November 19, 2018. Social worker Anna Robles testified mother completed her court-ordered services, but her behavior had not changed as evidenced by her continued frustration with Gabrielle. Although Gabrielle had difficulty focusing, she was able to focus if given time. The social workers in contrast did not have any problem communicating with Gabrielle. Robles clarified that Gabrielle's concerning behavior arose while mother was having unsupervised visitation with her. Robles became concerned about Gabrielle in April 2018 because she did not want to change her clothes and said father threw a plate of food at mother following an argument during a weekend visit and that the house was not clean. Robles said mother blamed her for filing the section 388 petition to institute supervised therapeutic visits. Mother's behavior did not change after they instituted the therapeutic visits. Instead, she appeared angry. Robles did not believe there was a substantial probability mother could reunify with her children.

Social worker Kate Martell testified Gabrielle was having difficulty reading and understanding but was otherwise doing well developmentally. She never had any difficulty communicating with Gabrielle. She supervised visits between mother and

Gabrielle at the park on October 30 and November 6, 2018. During the October visit, mother overreacted and was rough with Gabrielle. Gabrielle was playing with Marco and mother asked her to sit down. Gabrielle sat for a moment but then got up. Mother flicked her on the arm with her finger and then grabbed her right arm and pulled downward to make her sit down and grabbed her by the face to make her look at her and listen. Mother's reaction did not seem appropriate under the circumstances. Although the department did not mention the two visits in its report for the hearing, mother's attorney did not object to the evidence coming in or request a continuance to develop a rebuttal argument.

Martell testified the department was concerned that mother was not implementing the services she was provided. Further, any resistance Gabrielle may have had to attending school disappeared once mother's visits were reduced to therapeutic supervised visitation. Gabrielle asked that her visits be reduced to once a month, so she would not miss school. The only behavioral problems her grandparents had with her were those that followed visits with mother in which she became aggressive with her brother or cousins. As recently as November 13, 2018, she stated she wanted to be adopted by her grandparents.

Mother believed her children were closely bonded to her but testified Gabrielle was a difficult child. She listened to mother when they were alone but if there was anyone else around her behavior changed. Mother recalled the visit on October 30, 2018, but denied physically handling Gabrielle during the incident at the park. She explained Marco was hugging Gabrielle but suffocating her. She called out to Gabrielle who said they were okay and just playing. Mother carried Marco to a bench, put him on the bench to sit and gave him a three-minute timeout. She denied physically forcing Gabrielle to sit down, stating she just called her. She said the maternal grandmother was with them during the visit.

Following mother's testimony, the parties closed their evidence and submitted the case. The juvenile court continued the matter to December 6, 2018, for argument and its ruling. In the meantime, the department filed an addendum report on November 30 with additional evidence. Mother's attorney objected and asked the maternal grandparents to appear in case their testimony was necessary.

The juvenile court began the December 6, 2018, hearing by explaining to the maternal grandparents who were present why they were summoned. The court stated it read the addendum report but was not going to consider any further evidence. The court did not believe the information was critical to its decision or it would have reopened the case. The court granted the department's request to withdraw the addendum report and it is not part of the appellate record.² It appears, however, based on the court's discussion that it contained additional information about the October 30 and November 6 visits at the park.

The juvenile court found Gabrielle could not be returned to mother's custody, terminated her reunification services and set a section 366.26 hearing for March 28, 2019. The court continued reunification services for father and set the 18-month review for a hearing in January 2019. In ruling, the court commented on mother's demeanor, stating "[it] bordered on hostile" and made the court uncomfortable.

DISCUSSION

I. Section 366.21, subdivision (e)(4)

Mother contends the juvenile court erred in setting a section 366.26 hearing for Gabrielle without considering the affect it would have on her sibling relationship with

² Mother's appellate counsel motioned this court to augment the record with the addendum report filed on November 30, 2018. The superior court filed a declaration stating that the addendum report, having been withdrawn, was not in the juvenile court file.

Marco as required by section 366.21, subdivision (e)(4). We conclude the statute does not apply at the 12-month review hearing.

The duration of reunification services is set by statute in section 361.5, subdivision (a) and depends on the age of the child when taken into protective custody. For a child, like Gabrielle who was over the age of three when removed from parental custody, the law entitles the child to 12 months of reunification services. In the interest of expediting permanency and enhancing the chances for adoption of younger children, however, the Legislature allows for the termination of reunification services after six months if the child was under the age of three when initially removed. (§ 361.5, subd. (a)(1)(A)-(B);³ *Abraham L. v. Superior Court* (2003) 112 Cal.App.4th 9, 13.)

Where a sibling group is involved (two or more siblings removed at the same time in which at least one of the children was younger than three), the court may limit reunification services for the sibling group to six months from the dispositional hearing or continue the case to the 12-month reviewing hearing for all the children (thus increasing the reunification period for the younger sibling). “The clear purpose of these provisions is to give the court flexibility to maintain a sibling group together in a permanent home.” (*Abraham L.*, at p. 14.)

Section 366.21, subdivision (e)(4) requires the department to address certain factors in its report for the six-month review hearing when recommending the juvenile court set a section 366.26 hearing for some or all members of a sibling group. Those factors may include but are not limited to: whether the sibling group was removed from parental care as a group, the closeness and strength of the sibling bond, the ages of the siblings, the appropriateness of maintaining the sibling group together, the detriment to the child if the sibling ties are not maintained, the likelihood of finding a permanent home

³ Six months for the child under the age of three is calculated from the dispositional hearing. Twelve months for the child older than three is calculated from the date the child entered foster care. (§ 361.5, subd. (a)(1)(A)-(B).)

for the sibling group, whether the sibling group is currently placed together in a preadoptive home or has a concurrent plan goal of legal permanency in the same home, the wishes of each child whose age and physical and emotional condition permits a meaningful response, and the best interests of each child in the sibling group. The statute requires the court to specify the factual basis for its finding that it is in the best interest of each child to schedule a section 366.26 hearing. (§ 366.21, subd. (e)(4).)

Here, though Gabrielle and Marco are a sibling group, the juvenile court was conducting a 12-month, not a six-month, review hearing. Consequently, section 366.21, subdivision (e)(4) did not apply. Even if it did apply, requiring the court to specify a factual basis supporting its decision, we can infer any necessary findings based on the evidence. (*In re Corienna G.* (1989) 213 Cal.App.3d 73, 83-84 [necessary findings may be inferred if supported by substantial evidence].) Gabrielle and Marco were not going to reunify with mother and they desired different caregivers. Gabrielle was bonded to her maternal grandparents and already expressing her desire to be adopted by them. Marco, though too young to verbalize his desires, demonstrated by his behavior he wanted to be with his father and was progressing toward reunification with him. Under the circumstances, Gabrielle's interests were best served by proceeding to adoption planning while Marco's were best served by continuing reunification efforts with his father.

II. Detrimental Return

Mother contends the juvenile court erred in finding Gabrielle could not be returned to her custody without placing her at a substantial risk of detriment.⁴ Any concern by the

⁴ Appellate counsel does not frame the argument in those terms. Nor does he cite any statutory authority. However, we will construe his argument as a challenge to the juvenile court's finding of detrimental return. Appellate counsel contends there is insufficient evidence mother did not "benefit" from participating in reunification services. However, whether a parent benefits from services is not a legal standard. The standards are fundamentally two at the 12-month review hearing; i.e., whether there is a substantial risk of detriment to the child if returned to parental custody and, if so, whether there is a substantial probability the child can be returned to parental custody by the 18-

department that she did not benefit from services or would physically abuse Gabrielle, she asserts, were overcome by the fact that she completed her court-ordered services. We disagree.

“[T]he underlying purpose of dependency law is to protect the welfare and best interests of the dependent child.” (*In re Luke M.* (2003) 107 Cal.App.4th 1412, 1424.) “Although a parent’s interest in the care, custody and companionship of a child is a liberty interest that may not be interfered with in the absence of a compelling state interest, the welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect.” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307.) Thus, the focus is on the child, not the parent. “That is, once dependency jurisdiction is acquired because of the custodial parent’s conduct, the court’s inquiry shifts to a focus on the child’s best interests, albeit with a preference towards parental reunification.” (*Luke M., supra*, 107 Cal.App.4th at p. 1425.)

Once a child has been removed from his or her parent’s custody under section 361, the juvenile court is required to review the child’s status every six months. (*In re Joseph B.* (1996) 42 Cal.App.4th 890, 897.) At the 12-month review hearing, the court must return the child to parental custody unless it finds, by a preponderance of the evidence, that return “would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child.” (§ 366.21, subd. (f)(1).) The burden of establishing detriment falls on the department. (*Ibid.*) “The failure of the parent ... to participate regularly and make substantive progress in court-ordered treatment programs

month review hearing. There is also the question of whether the department provided reasonable reunification services, which appellate counsel clearly does not challenge. Since appellate counsel cites *David B. v. Superior Court* (2004) 123 Cal.App.4th 768 (*David B.*), which examines the return of a child to parental custody, we construe his argument as a challenge to the sufficiency of the evidence to support the court’s finding Gabrielle could not be returned to mother’s custody without subjecting her to a substantial risk of detriment.

shall be prima facie evidence that return would be detrimental.” (§ 366.22, subd. (a)(1).) However, as mother points out, technical compliance with a reunification plan does not necessarily mean the court can return the child to parental custody without exposing the child to a substantial risk of detriment. It only means there is not prima facie evidence of detriment.

Here, the juvenile court acknowledged mother’s participation in her services plan but concluded she failed to address the problem that required Gabrielle’s removal; i.e., frustration and irritability and the evidence bears that out. Mother admitted having little tolerance for Gabrielle and demonstrated it by her behavior. She had to leave the room to control her frustration and, just five weeks before the hearing, she yanked Gabrielle by the arm to force her to sit down. Mother simply didn’t have patience for Gabrielle and out of frustration physically abused her. Considering the seriousness of the physical abuse mother inflicted on Gabrielle and mother’s low frustration tolerance, the court could reasonably conclude that returning Gabrielle to mother’s custody would expose her to a substantial risk of detriment.

Mother, nevertheless, points to evidence she believes is favorable to her; i.e., her separation from father, long distance travel for visits and class attendance, and asserts, citing *David B.*, *supra*, 123 Cal.App.4th at page 773, that the “standard for parents in reunification is not perfection, but rather ‘passing grades.’ ”⁵ In essence, she is asking this court to reweigh the evidence, which we cannot do. (*In re Laura F.* (1983) 33 Cal.3d 826, 833.) Further, when reviewing for substantial evidence, we do not inquire whether the evidence supports a contrary finding, but whether substantial evidence, contradicted

⁵ In *David B.*, the court reversed a risk-of-detriment finding because the record clearly reflected the juvenile court deferred to the agency’s discretion when assessing the risk of harm to the child. (*David B.*, *supra*, 123 Cal.App.4th at p. 796.) The court stated, “[T]here are times when we have to take a step back and make sure that we are not losing sight of our mandate. We are looking for passing grades here, not straight A’s.” (*Id.* at p. 790.)

or not, supports the finding actually made. (*Adoption of A.B.* (2016) 2 Cal.App.5th 912, 925.) Here, for the reasons stated above, we conclude that it did.

III. Substantial Probability of Return

To the extent appellate counsel's argument mother benefitted from services is a challenge to the juvenile court's substantial probability of return finding, we find it lacks merit. At the 12-month review hearing, the juvenile court may continue the case if there is a substantial probability the child will be returned to parental custody within 18 months from the time the child was initially removed. (§ 366.21, subd. (g)(1).) To find a substantial probability of return, the juvenile court must find the parent regularly visited the child, made significant progress in resolving the problem prompting the child's removal, and demonstrated the capacity and ability to complete the objectives of the case plan and provide for the child's safety, protection, and well-being. (§ 366.21, subd. (g)(1)(A)-(C).) Otherwise, the court must terminate reunification services and set a section 366.26 hearing to implement a permanent plan for the child. (§ 366.21, subd. (g)(4).)⁶

Here, the juvenile court set the 18-month review hearing for January 11, 2019,⁷ and determined there was not a substantial probability mother could reunify by then. We conclude substantial evidence supports the court's conclusion. Mother's visitation even if consistent was regressing and, though she completed her services, she still had little tolerance for Gabrielle and remained predisposed to physically abusing her. Given

⁶ The juvenile court must also find by clear and convincing evidence the department provided reasonable reunification services to the parent before it can set a section 366.26 hearing. (§§ 361.5, subd. (a), 366.21, subd. (g)(4).) The court found mother was provided reasonable services and she does not contend otherwise.

⁷ Reunification services cannot exceed 18 months from the date the child was initially removed from parental custody. (§ 361.5, subd. (3)(A).) Gabrielle was initially removed in July 2017, making January 2019 the 18th month.

mother's lack of progress and the short time left to change, the probability Gabrielle could be returned to her custody was not substantial.

IV. Exclusion of Rebuttal Witnesses

Mother contends the juvenile court erred by not striking Martell's testimony about the October 30, 2018, visit in the park or allowing the maternal grandparents to testify as rebuttal witnesses. It was error not to strike it, she argues, because evidence about the visit was not contained in the department's initial report for the hearing. The court's decision not to call the witnesses, she further argues, deprived her of due process and the section 366.26 hearing must be vacated.

Though the addendum report is not part of the record, we can infer from the record it described the visits on October 30 and November 6, 2018, about which Martell testified. We can also infer the maternal grandparents were present at the visits and would have testified they did not observe any harmful interaction between mother and Gabrielle. Mother fails to show, however, how she was prejudiced by the court's refusal to strike the evidence or allow rebuttal testimony. First, mother testified about the specific events and was able to give her version. In addition, trial counsel could have but did not request a continuance to rebut the new evidence and chose to rest his case without presenting any more evidence on the issue. Finally, the court did not find the evidence sufficiently material at the time to warrant reopening the case and did not give it much weight in its final analysis. The court stated, "I am [tempted] to disregard the evidence from October 30 entirely ... because it plays such a small ... role in any decision I will allow it because it ... fits the pattern but is not weighty to this Court and would not change my decision in the least."

DISPOSITION

The petition for extraordinary writ is denied. This court's opinion is final forthwith as to this court.